United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

510

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,030

ADELAIDE LOGAN

Appellant.

v.

KATI WASHINGTON, LUMANDA JOHNSON, and MARY SCOTT

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Was not the Trial Court correct in granting judgment to appellees upon the ultimate finding of undue influence?

2. Was not the Trial Court correct in excluding the testimony of decedent's physician as to information acquired solely from the physician–patient relationship?

3. Was not the Trial Court correct in recognizing that the ultimate finding of undue influence would not have been disturbed by the testimony of the physician that the decedent was of sound mind?

COUNTERSTATEMENT OF FACTS

Appellant herein is seeking the reversal of the orders of the District Court granting judgment to appellees and denying appellant's motion for a new trial. The judgment, which nullified and voided a will and a deed running in favor of appellant, was based upon the ultimate finding of undue influence and bottomed on the following facts:

Appellant, during the month of April, 1964, moved into premises 48 Randolph Place, N.W., Washington, D.C., which premises were owned and lived in by Mrs. Rosa Lee Gary, to whom appellant was not related. At that time Mrs. Gary was bedridden, having been ill for a long time, and unable to care for herself. Because of her condition, she was cared for by Evelyn Jackson and Ora Bell Johnson and visited and cared for by relatives and friends. (Tr. 11-13, 42, 44-48, 71, 74-75, 96-97, 56, 69). Appellant's original status was that of a boarder, but during the month of June, 1964, she effected the discharge and removal of Ora Bell Johnson and Evelyn Jackson and assumed their duties. (Tr. 13, 18, 45, 48). Appellant and a male friend who roomed with her, thereupon enjoyed free room and board in return for her services. On July 1, 1964, appellant was named the sole beneficiary (saving only a life tenancy in one room of the house) of Mrs. Gary by a will which gave, devised and bequeathed the entire estate to appellant. (Tr. 8, 64, 65). Appellant was not satisfied. On July 8, 1968, appellant was granted the house by Mrs. Gary. (Tr. 8, 64, 65). Appellant actively procured the drafting and execution of the will and deed; she even selected the

lawyer and brought him to the house. (Tr. 64, 82, 159, 160.) On or about July 17, 1964, appellant secured a power of attorney from Mrs. Gary. (Tr. 105-107) Mrs. Gary had finally been "picked clean": Her monies, including monthly checks, were controlled by appellant by virtue of the power of attorney; her entire estate was left to appellant; and the very house in which she lived was given outright to appellant. Nothing had been left to chance. Appellant had systematically cut Mrs. Gary off from the world. First, the ladies Jackson and Johnson were removed. Next, friends and relatives were discouraged from coming to see Mrs. Gary. This was accomplished by refusals to admit them and by threats, including the threat to throw lye in their faces. Even the telephone was removed from Mrs. Gary's reach so that appellant could monitor all calls. (Tr. 14, 18, 53-60, 63-67, 71, 74, 75, 80-82, 96-98, 100, 102, 103.) On the rare occasions that friends or relatives, or even a Guardian ad Litem appointed by the District Court, gained admittance, no one was able to see Mrs. Gary alone. (Tr. 13, 23, 24, 39, 41, 77, 33, 84.)

During this time, Mrs. Gary was in constant pain, bedridden, suffered periods of depression and frequently broke out crying. She was not always able to comprehend what people were saying, nor was she always able to recognize people. She was better on some days, worse on others, and from time to time she seemed somewhat dazed or dizzy. (Tr. 13, 16, 17, 23, 22, 47, 51, 63, 67-70, 76, 77, 83.) Within a short time of doing so, she did not even realize that she had conveyed her house to appellant. (Tr. 65, 66.)

Appellant was unable to rebut the evidence that clearly reflected her to be a very domineering person, who dominated Mrs. Gary to the point that she was able to exert undue influence and seize control, possession and ownership of Mrs. Gary's property and estate and even of Mrs. Gary. Additionally, the Trial Court found

appellant not to be a credible witness on the bases of impeachment and demeanor.

Subsequent to the execution of the will, deed and power of attorney, Mrs. Katie Washington, sister of Mrs. Gary, petitioned for the appointment of a conservator for Mrs. Gary, which petition was granted over the opposition of Mrs. Gary. The Guardian ad Litem, after investigation which included an interview of Mrs. Gary in the presence of appellant, recommended the granting of the petition. (Tr. 20-36.) A conservator was appointed, but Mrs. Gary died before the conservator was able to take any action. The will was filed in the office of the Register of Wills, but was not offered for probate until January 30, 1968. (Memorandum of Trial Court, March 3, 1968.)

The appellees, Katie Washington, Mary Scott and Lumanda Johnson, heirs at law and next of kin of Mrs. Gary, filed suit in the District Court seeking to have the will and deed declared null and void, pleading, alternatively, undue influence and lack of capacity. After a full hearing on the merits, the District Court, sitting without jury, found that appellees had proven that the appellant had exercised undue influence on Mrs. Gary and that the will and deed were the products of that undue influence; accordingly, judgment was entered for appellees.

The District Court denied appellant's motion for a new trial and this appeal was filed.

SUMMARY OF ARGUMENT

I. Appellees, in seeking the relief granted by the District Court, pleaded, alternatively, that undue influence had been exercised by appellant on Mrs. Gary in securing the execution of the will and deed and that Mrs. Gary lacked the capacity to execute said documents. Appellees would be entitled to judgment upon proving either theory and, in fact, appellees urge that both have been proven. The District Court, however, specifically found that undue influence was proven and granted judgment accordingly. The necessary elements that must be proven to establish undue influence in order to set aside a will and deed are:

1. That the testator or grantor was subject to such influence.
2. That the opportunity to exercise it existed.
3. That there was disposition to exercise it.
4. That the result appears to be the effect of such influence.

These elements having been proven by appellees, the District Court correctly entered judgment for them.

II. The law in the District of Columbia is clear that a physician may not testify as to information acquired in attending a patient in a professional capacity and that was necessary to enable him to act in that capacity, unless the patient or legal representative consents to such disclosure. The patient having died herein, only the legal representative could waive the privilege and, there being no such waiver, the District Court properly excluded the testimony.

III. Even if the physician had testified that the defendant was, in his opinion, of sound mind at the time she executed the instruments, the ultimate finding of undue influence would not have been altered. Such testimony might have a bearing on an ultimate finding of lack of capacity, but the District Court correctly ruled that a

finding of sound mind was not crucial to the question of undue influence.

ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN GRANTING JUDGMENT TO APPELLEES UPON THE ULTIMATE FINDING OF UNDUE INFLUENCE

The evidence before the Court was clearly sufficient to warrant the ultimate finding of undue influence. The Court correctly recognized that the burden on appellees was a heavy burden, but that appellees had carried that burden. The Court further recognized that appellees, on the whole, carried their burden by circumstantial proof, but stated that:

> " * * * a case of undue influence is rarely if ever established by direct evidence, particularly where that influence has been exercised, if it has been exercised, on someone dead and not available to testify. The case of undue influence must depend on its own particular facts and each case must be weighed in terms of the totality of the evidence." (Court's ruling, page 3).

The Trial Court, in reaching its decision, relied on *Duckett v. Duckett,* 134 F.2d 527, 77 App. D.C. 303, 304, which case holds that undue influence need not be proven by direct evidence and, in fact, is nearly always proven by inference and circumstantial evidence. See also *Hagerty v. Olmstead,* 39 App. D.C. 170, 175, and *Barbour v. Moore,* 10 App. D.C. 30, 46.

In order to establish undue influence sufficient to warrant the rejection of a will or deed, it must be proven that the testator or grantor was subject to such influence, that the party charged had

the opportunity and disposition to exercise such influence and that the acts complained of appear to be the result and effect of such influence. Re *Hagan* 143 Neb. 459, 9 N.W. 2d 794, 154 A.L.R. 573, 582.

The trial below clearly reflected that all of the aforesaid elements were proven in the instant case. The decedent was bedridden and infirm and effectively separated from her friends and family. Appellant was the only person in constant contact with decedent, and the evidence clearly portrayed appellant to be a domineering person, while decedent was weak and susceptible to the pressures exerted by appellant. The evidence also irrefutably disclosed the appellant's opportunity and disposition to exercise undue influence. This was shown by the testimony concerning appellant's intentions regarding the house and her selection of the lawyer who drafted the will and deed. That the disposition of decedent's property was the result of such undue influence is equally without question. As the Court below aptly noted in its Ruling at pp. 4, 5:

> "This is not a case of a long period of faithful service. It is a case where the deed and will were executed in very short proximity to the time when the Defendant obtained control of the house."

Appellant received everything and the natural objects of decedent's bounty were left nothing.

It is noteworthy that appellant has not attacked the findings of fact of the Trial Court which were the bases for the ultimate finding of undue influence and the conclusions of law. Appellant apparently recognizes that the Trial Court's findings cannot be clearly shown to be arbitrary, capricious or based upon insubstantial evidence and, accordingly, must not be disturbed by an appellate court, even if such tribunal would have made different findings. *Remington Rand, Inc. v. Societe Internationale*, 88 App. D.C. 275,

277, 188 F.2d 1011 cert. denied 342 U.S. 832, 96 L.Ed. 630, 72 S. Ct. 44.

The cases concerning an ultimate finding of undue influence sufficient to void wills and deeds make it clear that the conclusion reached by the finder of fact (whether a jury or a court sitting without jury) must not be disturbed so long as it rests "upon evidence which affords adequate support for the ultimate inference drawn". *Barone v. Williams*, 91 App. D.C. 174, 176, 199 F.2d 189. See also *McCartney v. Holmquist*, 70 App. D.C. 334, 335, 106 F.2d 855, 126 A.L.R. 375.

Appellant's only argument with regard to the Trial Court's finding seems to be that the finding might have been different had not certain evidence been excluded by the Court. This contention, with which appellees strongly disagree, will be dealt with subsequently. Upon the evidence presented at trial, it is clear that the Trial Court's finding of fact, ultimate finding, conclusion of law and judgment must stand.

II.

THE TRIAL COURT WAS CORRECT IN EXCLUDING THE TESTIMONY OF DECEDENT'S PHYSICIAN AS TO INFORMATION ACQUIRED SOLELY FROM THE PHYSICIAN-PATIENT RELATIONSHIP, WHICH INFORMATION WAS NECESSARY FOR HIM TO PROPERLY ATTEND THE PATIENT.

In requesting this Court to reverse the judgment of the District Court and to remand the case for a new trial, appellant has presented one issue, to wit, the exclusion of the testimony of the decedent's physician. Appellant's contention in this respect is ill-founded, and the authorities cited as being supportive thereof are inappropriate.

In the first instance, the Trial Court did not exclude all testimony that might be relevant to the ultimate finding of undue influence, or even to the question of capacity, but, specifically, granted appellant the opportunity to make certain inquiries of the physician, subject to the Court's determination on an ad hoc basis, whether or not the responses to such inquiries would be admissible and what weight should be given to them. (Tr. 128, 129.) That appellant did not take advantage of the opportunity afforded by the Court's ruling, or even attempt to do so, cannot now be the basis for reversal.

Appellant, however, has chosen not to recognize the opportunity granted by the Trial Court and, instead, has based her appeal solely on whether or not the appellees were properly allowed to invoke the physician-patient privilege to exclude the physician's testimony. Appellees note that their objection below, being based on Section 14-307(a) D.C. Code 1967 Ed., was necessarily limited to the disclosure of necessary confidential information acquired by the physician while attending the decedent in a professional capacity. Section 14-307(a) reads as follows:

> "(a) In the courts of the District of Columbia a physician or surgeon may not be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a patient in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the patient or from his family or from the person or persons in charge of him."

The effect and construction of the above cited provision of law and its almost identical predecessor (Section 1073 D.C. Code) have been discussed from time to time by this Court, e.g., *Hutchins*

v. Hutchins, 48 App. D.C. 495, *Labofish v. Berman*, 55 F.2d 1022, 60 App. D.C. 397, *Thompson v. Smith*, 103 F.2d 936, 70 App. D.C. 65 and *Calhoun v. Jacobs*, 141 F.2d 729, 79 App. D.C. 29.

Chronologically, the first of the above cited cases was *Hutchins v. Hutchins* (1919), which dealt with Section 1073 D.C. Code. At page 500, the Court set forth Section 1073 as follows:

> " 'In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representatives, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity.' "

The differences between old Section 1073 and the present statutory provision are obviously inconsequential with regard to the question presented to this Court. Accordingly, the construction and application of the former section are applicable to the present case. This Court in the *Hutchins* case stated at 48 App. D.C. 500 that the only exception to the incompetency of a physician "to testify concerning confidential information acquired while attending a patient in his professional capacity" is "the consent of the patient or his legal representatives."

It is noted that the decision in *Hutchins* recognizes, as did the Trial Court in the instant case, that the attending physician is not completely barred as a witness but may testify as to information garnered outside of the express prohibition of the statute. This Court in *Hutchins* properly took exception to the Trial Court's permitting the physician to determine what was–and what was not permissible. In the case at hand, the Trial Court properly stated that the Court would determine what weight should be given to the testimony under the statute. Of course, the Trial Court in our case

had a distinct advantage over the Trial Court in *Hutchins*, in that our Court was hearing the case without a jury and, accordingly, could allow a greater leeway in testimony, subject to later disqualification, than could the former Court sitting with a jury. The ruling of the Court below herein makes it abundantly clear that it was aware of this difference.

This Court again considered the application of the statutory prohibition concerning testimony of physicians in 1932 in *Labofish v. Berman*, wherein it was stated at 60 App. D.C. 400:

> "that under the District of Columbia statute on the subject, a physician may not be permitted to testify (except by the consent of the patient or his legal representatives) as to any matter which has come to his knowledge strictly out of his professional relationship to the patient".

The application of the statutory exclusion was exhaustively discussed in *Thompson v. Smith* at 70 App. D.C. 66, 67, 68, which discussion included analyses of the *Hutchins* and *Labofish* cases. In *Thompson* the question presented was whether or not the executor could waive the privilege so as to permit a decedent's attending physician to testify as to necessary confidential information acquired by the physician. The case involved a caveat action and caveatee executor, on the issue of mental incompetency, offered two (2) physicians who had attended the decedent as witnesses. The caveator objected on the ground that the testimony was within the statutory privilege. The Trial Court ruled that the caveatee as executor could waive the privilege; this Court agreed, stating that the statute was clear and that a legal representative which included an executor could waive the privilege. The caveator relied, *inter alia*, upon the *Hutchins* case for the proposition that an executor could not waive the privilege. This Court in *Thompson*, at p. 67, stated the the exe-

cutors in *Hutchins* had not been allowed to waive the privilege because:

> "they were merely executors *eo nomine* and not *de jure,* this for lack of admission of the will to probate and formal issuance of letters".

In *Thompson,* however, letters testamentary had been issued and, accordingly, the executor was found to be the legal representative of the decedent within the meaning of the statute and, accordingly, had the authority to waive the privilege.

The *Thompson* Court explained the *Labofish* decision in the same manner, holding that the executor in *Labofish* had not been issued letters testamentary and, therefore, did not have the requisite authority to waive the privilege.

It is noted that *Thompson,* and *Hutchins* and *Labofish* as explained therein, are directly applicable to the instant case. The rule of law emanating from these three decisions is that only the patient or an authorized "legal representative" may waive the privilege and that a nominated executor to whom letters testamentary have not been issued is not a legal representative. In *Labofish* it was the nominated executor who attempted to elicit from the physician testimony concerning the mental condition of the decedent, and it was the heirs-at-law who were seeking to overturn the will who successfully interposed the objection to such testimony.

In addition to the above noted discussion of the earlier cases and enunciation of the rule embodied by the statute, the *Thompson* case is most pertinent to the instant appeal in its disposition of the arguments appellant therein made with regard to decisions from other jurisdictions. Appellant herein has stressed California and Oklahoma decisions in attempting to overturn the ruling of the Trial Court. The answer to this argument was stated in *Thompson,* at 70 App. D.C. 68, to be:

> "These arguments might be pertinent if the local statute were ambiguous or might be appropriate if presented to the Congress in support of a proposed modification of the statute. They are inappropriate here".

Appellant has cited *McSpadden v. Mahoney*, ___ Okl. ___, 431 P.2d 432, for the proposition that the rule of law in cases concerning the physician-patient privilege should be the same as the rule of law in attorney-client privilege cases. As in *Thompson, supra*, such reliance is inappropriate. The Oklahoma Court was construing a local statute, 12 O.S. 1961, Section 385, which establishes the privilege, and Oklahoma case law that the attorney-client privilege is inapplicable between parties claiming under the same client. It is noted that the Oklahoma statute deals with both the attorney-client and the physician-patient privileges and does not contain the express waiver provision of the District of Columbia statute.

Appellant's reliance on the California case *Moreno v. Guadalupe Mining Co.* 34 Cal. App. 744, 170 P. 1088, is also inappropriate. In that case the California Court was construing an explicit provision for waiver of the physician-patient privilege in the case of an action in the death of a patient.

Appellant has also cited the local cases of *Clark v. Turner*, 87 App. D.C. 54, 183 F.2d 141 and *Sorrels v. Alexander*, 79 App. D.C. 112, 142 F.2d 769, and is asking this Court to apply the court-developed considerations relating to the attorney-client privilege contained therein to the physician-patient privilege presented herein. In so doing, appellant has casually neglected the fact that the physician-patient privilege has been established in the District of Columbia by a clear and unambiguous statutory provision, whereas the attorney-client privilege in the District of Columbia is a carry-over of a common law and has no statutory basis. This fact is crucial to the

instant appeal and, accordingly, appellant's argument for the equality of the two privileges must fail.

The Trial Court and appellees recognized the difference between the two privileges and the prevailing rule of law that governs each. Appellees did object to the disclosure of necessary confidential information on the part of the attending physician but did not object to the testimony of the attorney who drafted and oversaw the execution of the will, deed, and power-of-attorney herein. Said attorney was permitted to testify as to the competency of decedent at the time of the execution of the will and deed and at other times, including the execution of power-of-attorney and opposition to the petition for the appointment of a conservator. (Tr. 105, 106, 112, 118.)

III.

THE TRIAL COURT WAS CORRECT IN RECOGNIZING THAT THE ULTIMATE FINDING OF UNDUE INFLUENCE WOULD NOT HAVE BEEN DISTURBED BY THE TESTIMONY OF THE PHYSICIAN THAT THE DECEDENT WAS OF SOUND MIND.

Appellees in the Court below asked that the subject will and deed be set aside either on the basis of lack of capacity or on the alternative count of undue influence. The Trial Court, in its Findings of Fact and Conclusions of Law, ignored the question of capacity and ruled specifically that the said documents should be set aside upon the ultimate finding of undue influence. The Court in its ruling found that even if the physician had been permitted to testify and had, in fact, testified that the decedent were at all pertinent times legally of sound mind that such fact would not have altered the Court's decision. Had the Trial Court ruled in favor of appellees on the basis of lack of capacity, such would not have been the case. As was stated in Argument I, the essential elements in

proving undue influence do not include lack of capacity. It is self-evident that such lack of capacity would, even standing by itself without undue influence, be sufficient to set aside the subject documents. Accordingly, the judgment of the Trial Court must be sustained, inasmuch as appellant's only basis for urging reversal of said judgment is the exclusion of the physician's testimony, which testimony, even if most favorable to appellant, would have no bearing on undue influence.

CONCLUSION

Appellees submit and strongly urge that the judgment of the Trial Court be affirmed. Appellant has demonstrated no basis for the reversal of the judgment. The record herein reflects that the findings of the Trial Court were amply supported by substantial evidence, and appellant's sole contention is without merit. Furthermore, even if appellant's sole contention were legally sound and the Court below was in error in its limited exclusion of the physician's testimony, such testimony, drawing the most favorable inference possible, would have no bearing on the question of undue influence, which was proven not only by a preponderance of the evidence but beyond a reasonable doubt.

Respectfully submitted,

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NO. 22030

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Brief of Appellant

WILLIAM S. D'AMICO OK
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STATEMENT OF THE ISSUE

Whether plaintiff-heirs in an action to set aside a will and a deed on grounds of undue influence can invoke the physician-patient privilege to exclude the testimony of the decedent's physician relevant to the issue of undue influence particularly when the plaintiff-heirs have themselves made an issue of the decedent's condition and have placed extensive testimony concerning it in evidence.

This case has not previously been before this Court.

List of specific pages of Reporter's Transcript that Appellant calls to the attention of the Court.

A. Direct testimony of Appellees' Witnesses:

1. Evelyn Jackons, T. pp. 12,16;
2. Charles W. Halleck, T. pp. 22-23;
3. Ora Bell Johnson, T. pp. 45-47;
4. Simon Sykes, T. pp. 62-63;
5. Edward Gary, T. pp. 76-77;
6. Mary Scott, T. pp. 83-84.

B. Findings of fact, conclusions of law and opinion, of the District Court.

1. Ruling of the Court on the admissibility of the testimony of the decedents physician, T. pp. 121-132.

2. Court's ruling, T. p. 171-176.

STATEMENT OF CASE

This matter was commenced in the United States District Court for the District of Columbia by plaintiffs (here appellees) who are the heirs-at-law of the late Rosa Lee Gary. Their complaint, filed September 13, 1965, alleged that the defendant, (here appellant) Adelaide J. Logan, while employed as housekeeper by the late Rosa Lee Gary, used undue and improper influence to cause Mrs. Gary to make a will, dated July 7, 1964, bequeathing all her property and estate, less certain specific bequests, to the defendant. Also it was alleged that because of Mrs. Logan's undue and improper influence Mrs. Gary granted to Mrs. Logan a deed to property owned by her. According to plaintiffs Mrs. Gary at the times in question was of unsound mind and incapable of executing a valid deed or contract. Plaintiff on these grounds asked that the deed and will be declared nullities and that they, as heirs at law, be held entitled to share in the estate of Rosa Lee Gary.

The defendant's answer denied that Mrs. Gary was of unsound mind at the time of executing the will and deed, and denied that Mrs. Logan used any improper or undue influence on Mrs. Gary.

On January 25, 1968, the motion of defendant's counsel to withdraw was granted. And on January 26, 1968, the court entered a default against the defendant. A new attorney made his appearance

for the defendant on January 30, 1968, and on January 31, moved to vacate the default and filed a new answer. This answer substantially repeated that filed originally.

The default was set aside on February 5, 1968, and the matter came to trial on February 12 before the Honorable Gerhard A. Gesell.

At the trial the plaintiff presented a series of witnesses who testified as to the behavior of the defendant and to the mental and physical condition of the deceased Mrs. Gary. The defense presented several witnesses, including the defendant herself, to contest the claims of the plaintiff. In the course of the presentation the testimony of Dr. Louis P. Levitt, M. D. was offered. Dr. Levitt had been the decedent's physician during the relevant times and the plaintiffs objected to his testifying on the grounds of the statutory physician-patient privilege, Section 307 of Title 14 of the District of Columbia Code. The court sustained the plaintiff's objection. This ruling was seriously prejudicial to the defendant.

The court's judgment of February 19, 1968, declared the will and deed to be null and void and ordered the defendant to surrender possession of the property of Mrs. Gary to the plaintiffs.

On February 16, 1968, defendant made a motion for a new trial alleging as grounds, inter alia, the refusal of the court to

admit the testimony of Dr. Levitt. This motion was denied on February 27, 1968.

From the denial of this motion for a new trial and from the judgment of February 19, 1968, this appeal is taken.

This Court has jurisdiction under 28 U.S.C. 1258.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue presented here is whether plaintiff-heirs in an action to set aside a will and a deed on grounds of undue influence can invoke the physician-patient privilege to exclude the testimony of the decedent's physician relevant to the issue of undue influence particularly when the plaintiff-heirs have themselves made an issue of the decedent's condition and have placed extensive testimony concerning it in evidence.

SUMMARY OF ARGUMENT

The statutory physician-patient privilege relating to confidential communications is grounded upon the public interest in keeping private those matters which come to the knowledge of a physician while attending a patient in a professional capacity, and which are necessary to enable the physician to act in that capacity.

The rationale of such policy is that the threat of disclosure of such matters to the general public, and the repugnancy felt by a patient to such possible disclosure, may

inhibit the physician's accumulation of necessary knowledge for the efficient treatment of the patient.

The instituting of a suit by the heirs of a deceased patient in which the very declaration, and much more the proof offered by the plaintiffs, discloses the ailment to the world at large, is of itself a declaration that the supposed repugnancy to disclose does not exist, and that justice demand, that the plaintiffs by such acts, have in fact waived the privilege.

ARGUMENT

When seeking to set aside a will or deed on grounds of undue influence plaintiff-heirs cannot invoke the physician-patient privilege to exclude testimony of the decedent's physician relevant to the issue of undue influence particulary when they themselves have placed in evidence testimony concerning the decedents condition.

The statutory physician-patient privilege relating to confidential communications, Section 307 of Title 14 of the District of Columbia Code,[1/] is grounded upon the public interest

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1/ The Statute reads:

"(a) In the courts of the District of Columbia a physician or surgeon may not be permitted, without the consent of the person afflicted, or his legal representative, to disclose any information confidential in its nature, that he has acquired in attending a patient in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the patient or from his family or the person or persons in charge of him."

in keeping private those matters which come to the knowledge of a physician while attending a patient in a professional capacity, and which are necessary to enable the physician to act in that capacity. The historical rationale of such a suppression of material facts, is the encouragement of freedom of disclosure by the patient in order to aid in the effective treatment of disease and injury. To achieve this goal, the immediate desired effect of the privilege is to shield the patient against the embarrassment and invasion of privacy which disclosure would entail. Moreno v. Guadalupe Mining Co., 35 Cal. App. 744, 170 P. 1088 (1918). Calhoun v. Jacobs 79 App. D. C. 29, 141 F. 2d 729 (D.C. Cir. 1944); also see 8 Wigmore, Evidence Section 2380a (Mc Naughton rev. 1961).

Without such privilege, full interchange of information, which is necessary to the proper conduct of the relationship, may not be possible. However because the privilege, unless waived, excludes what would otherwise be relevant evidence, and thus hampers the trial court in correctly finding the facts, it should be carefully confined in application to those situations which fall within the spectrum of the purpose for which it exists.2/

2/ see Judge Washington's opinion in Clark v. Turner, 87 App. D.C. 54, 183 F.2d 141 (D.C. Cir. 1950) at 142, in which he discusses a similar privilege, i.e., attorney-client, and its proper limitation in order to avoid undue interference with the presentation of evidence.

The privilege like all such privileges, may be waived, and such waiver may be expressed by conduct. Appellant contends that waiver of the physician-patient privilege must be implied whenever the patient is deceased and the action by heirs by its nature, makes medical data concerning the deceased relevant to the central issue in litigation.[3/] No other interpretation of the statute is fair or reasonable. There is an inherent injustice in permitting heirs to seek to set aside a will or deed on the grounds of undue influence and unsound mind, and at the same time exclude evidence crucial to the issue they themselves have raised.

The logic of this argument is supported by the position this Court has taken in regard to the attorney-client privilege. In Sorrels v. Alexander 79 App. D. C. 112, 142 F. 2d 769, (D.C. Cir. 1944), it was held that the decedent's rights under the attorney-client privilege could not peoperly be envoked by persons seeking to set aside the decedent's will on grounds of undue influence. Similarly this Court in Clark v. Turner 87 App. D. C. 54,

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3 / Appellant recognizes that the holding Labofish v. Berman, 60 App. D. C. 397, 55 F.2d 1022 (D.C. Cir. 1932) would seem to be contrary to our contention, however, the decision does not indicate the issue of waiver was raised before the court, and seems only to say that the heirs were proper parties under statute to invoke the privilege.

183 F. 2d 141 (D. C. Cir. 1950), held that those defending against an action to establish a lost will could not envoke the decedent's attorney-client privilege.

No meaningful basis can be found for differentiation between the attorney-client privilege and the physician-patient privilege. Nothing in public policy or in the language of Section 14-307 justifies their different treatment. Both logic and justice demand that the limitations placed on the attorney-client privilege be similarly applied to the physician-patient privilege.[4/] As far as heirs or personal representatives are concerned there is nothing inherently more sacred or private about a dead person's relationship to his physician than to his attorney. Therefor we submit, where the confidences of either relationship are made the subject of litigation by those who have only a "second hand" claim to the privilege, that privilege must be considered waived.

It is appellant's further contention that when the appellees as heirs of the deceased patient, elicited evidence and indeed themselves testified to the unhealthy condition of the body and mind

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4/ In a recent case involving a suit by heirs, to set aside an inter vivos gift, the Oklahoma Supreme Court ruled that in Litigation between grantees, devisees and heirs, all claiming under the deceased, both the attorney and the physician of the deceased are competent to testify and may be called as witnesses by any of the parties. After citing a series of cases involving the attorney-client privilege, the Court said,"...we perceive no reason for applying a different standard to the physician-patient privilege." McSpadden v. Mahoney, _____ Okl. _____ 431 P. 2d 432 (1967), at 441.

of the deceased, which in fact disclosed the ailment to the world at large, they explicitly waived the inherited privilege.5/

In a ruling involving a California statute essentially the same as the physician-patient statute in the District of Columbia, and which also does not define the term "waiver", the California District Court of Appeals for the First District, in Moreno v. Guadalupe Mining Co., 34 Cal. App. 744, 170 P. 1088 (1918), held that in an action by an administratrix for the death of her husband, the administratrix implicitly waived the privilege which had been transmitted to her care and keeping by taking the witness stand, and in conjunction with other witnesses whom she called in her behalf, voluntarily testifying to the nature of the deceased's ailments. The Court reasoned that the plaintiff and her witnesses, by so testifying gave publicity to all that ailed the deceased and thereby broke the seal of privacy, privileged by the statute. The procedure thus pursued by the administratrix, being a voluntary exploitation of the condition of the deceased, initiated an inquiry that could only be justly brought to a close

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5/ Testimony by Appellees' witnesses as to the physical and mental condition of the deceased; Mary Scott, Transcript pp. 83-84; Edward Gray, Transcript pp. 76-77; Simon Sykes, Transcript pp. 62-63; Ora Bell Johnson, Transcript pp. 45-46,47; Charles W. Halleck, Transcript pp. 22-23; Evelyn Jackson, Transcript pp. 12, 16.

by the testimony of the attending physician concerning the same subject matter. In the court's opinion, this view is in consonance with the spirit and purpose of the privilege, and in accord with the exact administration of justice.

In the case at bar the appellees and their witnesses extensively testified as to the physical and mental condition of the deceased. Justice demands that such parade of ailments by the heirs of the deceased, which discloses the very intelligence they claim is privileged, estoppes the heirs from invoking the privilege and in fact must constitute a waiver of the inherited privilege.

CONCLUSION

Appellant asks the Court, for the reasons stated above, that the judgment of the District Court and the order denying appellant's motion for a new trial, be reversed and the case be remanded for a new trial with instructions to the District Court to admit the testimony of the decedent's physician relevant to the issue of the decedent's competency and undue influence.

Respectfully submitted,

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